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Dolores Clayton, et, al. vs. Ford Motor Company : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOLORES CLAYTON, et al. Plaintiffs/Appellants, vs. FORD MOTOR COMPANY, Defendant/Appellee.	**APPELLANTS'COMBINED REPLY BRIEF AND CROSS-APPELLEES' BRIEF** Appellate Case No. 20070517-CA Civil No. 000909522

Appeal from the Judgment of the Honorable Joseph C. Fratto
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

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Appellants request oral argument and a published opinion.

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INTRODUCTION

The majority of Ford's Brief urges the Court to apply incorrect legal standards of review, reframes issues and presents misleading facts to argue waiver, harmless error or invited error on several issues where none occurred. Each incorrect factual statement and erroneous legal standard relative to Ford's argument will be addressed separately in this reply. Appellants should be awarded attorney's fees under Utah R. App. P. 33, for having to respond to Ford's frivolous misrepresentations of fact and law.

Ford argues that this Court should accept the jury's verdict as accurate and binding even though the driver's door latch was physically altered by Ford's expert after it was removed. The jury's verdict was based on false evidence. Ford presented the altered door latch and several blow-up photographs to the jury. The latch went into the deliberation room with jurors. This Court should review the issue and reverse with instructions.

Ford argues appellants were given "extraordinary opportunities to develop their theories and present them to the jury." (Ford's Brief, p. 7.) Not so. The trial court prematurely cut-off appellants' request for door latch discovery with a protective order. (R. 3303-3304.) Then, almost a year after expert discovery cut-off, shortly before trial, Ford was allowed to remove the driver's door latch, (which was how the subtle fraud was perpetrated). (R. 6811-6812.) The trial court also reversed itself on a major part of appellants' case, after appellants told the jury that it would hear evidence of Ford's knowledge of the Explorer's design instability. (See Appellants' Issue VI.)

KELLIE MONTOYA'S OPPOSITION TO FORD'S CROSS-APPEAL

At trial, Ford presented no evidence of the date Kellie Montoya filed suit against Ford. Consequently, Ford has failed to marshal the record in support of its claim that the jury's special finding is against the weight of the evidence, and this precludes review of Ford's appeal. The evidence presented at trial establishes that the jury sufficiently identified, by an objectively reasonable standard, the date Kellie should have known to sue Ford for the design defects which caused her injuries.

Ford's notice of appeal does not appeal the trial court's denial of its 2005 summary judgment motion against Kellie. Therefore, the issue has not been preserved. The trial court did not err in rejecting Ford's summary judgment motion. Kellie's frontal lobe brain injury was so severe she was life-flighted to the hospital; she could not recall the events. Attorney Keith Barton was hired for the sole purpose of obtaining a settlement from Geico insurance for Kellie's medical expenses. Ford's claim that Barton should have known to sue Ford for the Explorer's instability and design defects back in March 1999 should be rejected. The Explorer's defects and instability were concealed from the public and were not known until later when state attorney generals and the National Highway Traffic Safety Administration began inquiry into the Explorer's safety.

Ford's statement in its brief that attorney Barton inspected the Explorer is completely false and the exact opposite of the record.

* * *

REPLY ARGUMENT

I. THE TAMPERING WITH THE DOOR LATCH ISSUE WAS RAISED BELOW AND ARGUED; THE RECORD ESTABLISHES THE COURT CONSIDERED THE ISSUE; THUS, ADEQUATELY PRESERVING THE ISSUE FOR APPELLATE REVIEW.

Fraud perpetrated on a jury is a serious allegation involving corruption of the judicial process itself (*In re Whitney-Forbes*, 770 F.2d 692, 698 (7th Cir. 1985)) and should be reviewed.[1]/ A fraud perpetrated on the jury is an affront to the judicial system. In the interest of justice, this Court has the inherent authority to review the facts and evidence supporting the altered/tampered with door latch contention.[2]/ (See AOB, p. 15, fn. 7.)

A. There was No Waiver. Ford argues that appellants only alleged the tampering of the door latch issue under Utah R. Civ. P. 50 for JNOV. (Ford's Brief, p. 19.) Not true. Appellants moved for JNOV and a new trial based on Utah R. Civ. P. 59 (a)(6). (R. 10949, 10959 [Addendum 50].) Appellants thereafter amended their notice to identify Utah R. Civ. P. 59 (a)(1) as a further legal ground to grant the new trial. (R. 11236-11237.) Appellants' amended notice states the additional grounds relate back to the motion already filed. (R. 11226-11227 [Addendum 51].) Appellants' reply brief

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[1] Equitable relief against fraudulent evidence is not a statutory creation but a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to a court-made rule. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 [64 S. Ct. 997, 88 L. Ed. 1250] (U.S. 1944).

[2] A jury's verdict can be set aside when the ends of justice require it. An appellate court can also set aside the jury's verdict. (R. 10954, 10959; AOB p. 15, fn. 7; *Kilpack v. Wignall*, 604 P.2d 462, 466 (Utah 1979) citing *Weeks v. Latter-day Saints Hospital*, 418 F.2d 1035 (10th Cir. 1969).

rebutted statements made by Ford in its opposition to appellants' motion for new trial.

Ford's contention that it had no opportunity to reply to appellants' amended notice and reply brief should be rejected. (Ford's Brief, p. 21, fn. 9.) Ford ignores the record. Ford filed a rebuttal in its motion to strike portion of plaintiffs' reply brief, arguing Caulfield did not tamper with the latch. Ford did not object to appellants' amended notice on the Rule 59 (a)(1) ground; Ford only moved to strike the "tampered with" or "manipulated" language in appellants' reply brief that argued Ford's expert, Ed Caulfield, had perpetrated a "fraud" at trial. (R. 11351-11356 [Addendum 96].) Ford's motion to strike was not granted, and Ford has not appealed the issue. (R. 11397-11398 [Addendum 97].) Ford cannot now complain.

The record also establishes that appellants' Rule 59 (a)(1) ground was preserved for appeal. During oral argument on May 7, 2007, the trial court stated that it had read the record and understood the issue before it was that the latch had been tampered with. (R. 11467, p. 12 [Addendum 83].) The court then entertained the "fraud" argument. Appellants argued Ford's expert had tampered with the latch. (R. 11467, p. 8, 12-18 [Addendum 83].) Ford vigorously argued the merits of the fraud issue, including spuriously stating to the court that Mr. Gilberg had moved the fork bolts on the driver's door latch with pliers during his vehicle inspection while Ford's counsel was present. (See, R. 11467, pp. 21-22 [Addendum 52].) Ford's statement was false. [Addendum 53, Gilberg Affidavit, ¶ 4.] Ford erroneously and misleadingly now argues that the trial court denied appellants' Utah R. Civ. P. 59 (a)(1) amended motion as untimely. (Ford's Brief,

p. 7, 21.) No such ruling was made on untimely or on any other ground. (R.11375 [Addendum 17].)

Ford further argues that the fraud issue was not preserved for appellate review because it was not addressed in the trial court's Memorandum of Decision. (Ford's Brief, p. 21.) Again, Ford's argument is flawed. Appellants had no basis to ask the court to reconsider a final order. The Utah Supreme Court has specifically rejected the practice or seeking reconsideration of final orders. See, *Gillett v. Price*, 2006 UT 24, P1 [135 P.3d 861] (Utah 2006).

Also, *State v. Mullins*, 2005 UT 43, P8 [116 P.3d 374] (Utah 2005) cited by Ford arguing the trial court had no jurisdiction, is not on point and is distinguishable from the circumstances here. (Ford's Brief, p. 21.) Mullins' first motion to withdraw his plea was not pending at the time his subsequent motions were filed, thus, his subsequent motions did not relate back, for jurisdictional purposes, to his first motion. In contrast, appellants' timely new trial motion was pending. Appellants amended notice of motion and reply brief was also filed and pending. When the court did not grant Ford's motion to strike and allowed the parties to argue the fraud issue at oral argument, the matter was entertained and pending. Cf., *Peirce v. Peiree*, 2000 UT 7, P16 [994 P.2d 193] (Utah 2000) [issue addressed before memorandum of decision preserves review].

Utah R. Civ. P. 59 (a)(1) authorizes the trial court to grant a new trial based upon "irregularity in the proceedings of the court, jury...which...prevented [a party] from having a fair trial." Appellants were not required to make a contemporaneous objection

or motion for mistrial to bring a new trial motion on this ground.[3]/ The statute does not require a contemporaneous objection, only an irregularity in the proceedings. (See, Ford's Brief, p. 19.) Furthermore, the error here was not invited because the court gave the appropriate instruction, Jury Instruction No. 10.[4]/ (R. 11484, p.11 [Addendum 99].) No other curative jury instruction would have corrected the error caused by presenting false evidence for the jury's consideration. Further, a contemporaneous motion for mistrial, as Ford now suggests, even if successful, would have provided the same remedy sought in the lower court by filing the new trial motion for relief. Thus, there was no waiver of the relief sought on (a)(1) grounds.

B. A New Trial is Warranted because the Irregularity in the Proceedings Prevented Appellants from Receiving a Fair Trial.

Mr. Gilberg did not agree with Ford's expert, Ed Caulfield, about the position of the jaws. (Ford's Brief, pp. 18, 22-23.) Ford incorrectly analyzes Gilberg's testimony and misstates the state of the photographic evidence. Also, contrary to Ford's bold assertion, Gilberg does not state the latch was in the "same" position. (Ford's Brief, p. 22.)

Gilberg went on to testify that the fork bolt was well beyond the secondary position, stating "its really open." (R. 11474, p. 218 [Addendum 92].) Ford takes

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[3] Ford argues waiver based on *State v. King*, 2006 UT 3, P13 [131 P.3d 202] (Utah 2006) and *State v. Baker*, 935 P. 2d 503, 510 (Utah 1997). (Ford's Brief, p. 21.) These cases involve peremptory challenges of jurors and are not on point. *State v. Pinder*, 2005 UT 15, P 46 [114 P.3d 551] (Utah 2005) is inapplicable. Here, the trial court acknowledged it was entertaining the (a)(1) ground at oral argument. Hence, no waiver.

[4] Jury Instruction No. 10 states: "If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of that witness, except as that witness may have been corroborated by other credible evidence."

Gilberg's testimony out of context. Continuing, Gilberg explained the fork bolt was pinned in the (bent up) latch due to ground contact. Ford's counsel posed this hypothetical: "take out the ground contact...the fork bolts[5]/ would be in a completely open position?" To which Gilberg explained that the impact of the door with the "B" pillar could smack the fork bolts before they were fully open. (R. 11474, RT 218 [Addendum 92].)

When Gilberg testified, he did not discern the subtle alteration of the latch; that the fork bolts were moved further towards a closed fixed position. So, when viewing the latch for the first time after the surrounding sheet metal door skin was removed, Gilberg assumed the latch was in the position it was in when still in the door, and answered Ford's counsel's question: "Well, they were pretty much in the condition you see here." Gilberg testified that the latch was 90-percent open; his equivocal response reveals his not recalling the fork bolt in the "new" position.[6]/ (R. 11474, pp. 217, 219, 220 [Addendum 92].)

Contrary to Ford's misstated claim, the driver's door latch's "open" position is not merely observed in "a few photographs." (Ford's Brief, p. 22.)[7]/ Ford's engineer, Mr.

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[5] "Jaws," "fork bolts" and "latch bolts" refer to the same part on the latch.

[6] An examination of the photographs [Addendums 55, 56, 57, 58, 59, and 60] reveals that the deformed sheet metal of the door skin itself is pushing one fork bolt slightly towards closed by only a slight degree, the "nose" or "ear" extending onto the opening of the "fish mouth." [Addendum 53, Gilberg Affidavit, ¶ 6.] However, the driver's latch was "fully open" in terms of the latch operation depiction language.

[7] Ford argues Gilberg's affidavit does not address the alleged door latch tampering issue. (Ford's Brief, p. 26.) Again, not true. Gilberg's affidavit states that Tiede's report

Tiede, who inspected the door closely before the inside operation became an issue, reported no latch bolt deformation, and described the latch in a fully open operating position. (R.11013-11015 [Addendum 61].) The fork latch bolts were never bent or deformed out of plane, at least not until Packer Engineering got its hands on the latch after removal. Mr. Gilberg states in his affidavit that the door latch bolts were always found in an open operating position. [Addendum 53, Gilberg Affidavit, ¶ 7.] "None of the other photographs taken by the other Ford engineers during their vehicle inspections show that the fork bolts had ever been moved following the subject accident." Emphasis added. *Ibid.*[8]/

Ford argues Gilberg's affidavit does not undermine confidence in the verdict.[9]/ (Ford's Brief, p. 26.) Not so. When Caulfield's associate Kevin Vosburgh first inspected the driver's door latch, he also photographed it "open." (R.10996-11000 [Addendum 60 -

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indicates the latch operation remained in the same position as when Mr. Gilberg inspected it, and that all of the photographs depict the latch operation in the same position and "show that the fork bolts had never been moved following the subject accident." [Addendum 53, Gilberg Affidavit, ¶¶ 6, 7.]

[8] Ford collaterally argues the latch was found in a locked position inconsistent with the Clayton theory. (Ford's Brief, p. 25.) Ford neglects Mr. Gilberg's testimony concerning the ground contact deforming the lock activation levers and the ease by which the lock can relock. (See, R. 11474, pp. 219-220 [Addendum 92].) Gilberg does not agree with Ford.

[9] Ford also misstates that Caulfield consistently testified that all of the photographs depict a partially open latch. (Ford's Brief, p. 23.) Not true. He initially testified the latch was photographed by at least two other Ford experts in an open position. (R.11481, p. 99-101, 106 [Addendum 100.] Of course Caulfield then claimed the photos only showed the latch partially open. After being caught during cross-examination, Caulfield was not going to admit the state of the evidence. However, Ford's expert Tiede truthfully reported the latch operation fully open.

Trial Exhibits P-320-D, P-320-K, P- 467-47, P-467-52, P-467-125].) By trial, the fork bolts were manipulated out of plane and pushed to a partially closed position to match Caulfield's transverse load test theory. (R. 11480, pp. 50, 51-52 [Addendum 63].) Significantly, at trial, Ford presented no evidence that there was any damage observable through the "factory window."[10]/ (See, R. 6748 [Addendum 49].) The tampering was so subtle it was not noticed until Ford put Mr. Caulfield on the witness stand, and then began examining him with a choreographed series of questions together with large blown-up photographs showing the planes of the fork bolts out of alignment.[11]/

Ford contends the error in admitting the tampered-with door latch and blow up photographs was harmless because there was ample evidence to support the jury's verdict. (Ford's Brief, pp. 24, 25.) Harmless error occurs where the error is sufficiently inconsequential and there is no reasonable likelihood it affected the outcome of the proceedings. *Larsen v. Johnson*, 958 P.2d 953, 958 (Utah Ct. App. 1998). Here, it cannot be said the error was inconsequential. Ford relied on the altered door latch evidence to argue Caulfield's theory to the jury:

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[10] It is highly relevant that Tiede did not find any latch bolt deformation. Significantly, this Court can also weigh Ford's purported reason for removing the driver's door latch and the timing of its removal almost a year after discovery cut-off.

[11] Ford argues that appellants have misstated *Chewining v. Ford*, 354.S.C. 72, 78 [579 S.E.2d 605] (S.C. 2003). (Ford's Brief, p. 22, fn. 10.) Not true. The South Carolina Supreme Court granted review of the decision which reversed a lower court order dismissing an action for "fraud upon the court" and an "independent action in equity for fraud"against Ford pursuant to Rule 12 (b)(6) and affirmed the appellate court's judgment. As noted in appellants' brief, this is not the first time Ford has allegedly perpetrated fraudulent testimony. (See AOB pp. 19-20.)

> ... **In the rod foreshortening theory, bing, the latch is open**...Not this latch. Not the Clayton latch. The [fork] pawls were bent partially open, and the, and the entire latch mechanism was bent. Here it is again. **And here's 956-B. These are in evidence. The latch itself is in evidence. Look at the bowing there. Very much like the transverse test that Dr. Caulfield did**...You don't get that, folks, from this latch theory. The physical evidence shows it didn't happen that way." (Emphasis added; R. 11483, pp. 63-64 [Addendum 12].)

Furthermore, harmless error review and a sufficiency of evidence examination as argued by Ford, does not apply to review of the denial of appellants' new trial motion made pursuant to Utah R. Civ. P. 59 (a)(1). (See AOB, pp. 14-15.) An abuse of discretion standard applies. (*Smith v. Fairfax Realty, Inc.*, 2003 UT 41, P25 [82 P.3d 1064] (Utah 2003). Ford also ignores *Meyer v. Srivastava,* 141 Ohio App. 3d 662, 666-667 [752 N.E.2d 1011] (Ohio Ct. App. 2001), an Ohio appellate court case where a new trial was granted on substantially analogous grounds.[12]/ (See AOB, p. 20.) Utah courts often look to other jurisdictions with similar rules for guidance. *State v. Wanosik*, 2003 UT 46, P23 [79 P.3d 937] (Utah 2003).[13]/ The trial court here did not apply the correct legal reasoning in denying appellants' new trial motion as argued and submitted on the (a)(1) ground. Reversal under the circumstances is warranted. This Court can also instruct the lower court to reconsider its decision or hold an evidentiary hearing on the (a)(1) ground based on Gilberg's affidavit.

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[12] In *Meyer v. Srivastava, supra*, photographs of a water heater from a different residence were shown to the jury as the actual water heater involved. Similarly, the introduction of the altered door latch and blown up photographs warrants reversal or reversal with instruction to hold an evidentiary hearing on whether there was a fraud/irregularity perpetrated on the jury.

[13] Ohio Civ. P. 59 (a)(1) is worded the same as Utah's rule.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING IMPEACHMENT EVIDENCE THAT WAS EXCHANGED PURSUANT TO UTAH R. CIV. P. 26.

Ford's semantics to make the basis of their legal argument is frivolous and flawed. (Ford's Brief, p. 28.) At trial, appellants sought cross-examination of Caulfield on the opinions of Mr. Tiede. (R. 10234, 10235 [Addendum 69]; R. 11481, p. 24, 28.) Caulfield's deposition states he considered Tiede's report in reaching his own opinions in the case. (R. 10239.) Appellants argue on appeal that they sought to "impeach" Caulfield with the evidence in the report pursuant to Utah R. Civ. P. 26, and the evidence was admissible. (AOB, p. 22, 24.) Impeachment evidence is evidence used to undermine a witness' credibility. *Glacier Land Co., L.L.C. v. Claudia Klawe & Assocs., L.L.C.*, 2006 UT App 516, P29 [154 P.3d 852] (Utah Ct. App. 2006). Impeachment means cross-examination.

Ford's argument that Tiede's findings lacked foundation should be rejected. Ford in essence, vouched for Tiede's report and its contents by exchanging it pursuant to Rule 26. (R. 11481, p. 28.) Ford's brief altogether ignores the advisory committee note for Rule 26 (a)(3) discussing "expert reports" which provides: "[i]n effect, the report will serve in lieu of responses to standard interrogatories." Emphasis added.

Tiede's findings of fact and photographs from his vehicle inspection were produced by Ford as discovery in lieu of a standard interrogatory. The evidence was admissible impeachment evidence.[14]/

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[14] Ford argues appellants were limited in their cross-examination to matters raised on direct examination. (Ford's Brief, p. 30, fn. 15.) Tiede's report, exchanged by Ford

Ford's argument that Tiede was required to lay a foundation is also flawed because Caulfield considered Tiede's report in reaching his opinions in the case. (R. 10239.) It was therefore appropriate to cross-examine Caulfield on Tiede's findings. (R. 10234; see, *Patey v. Lainhart*, 1999 UT 31, P30 [977 P.2d 1193] (Utah 1999).

The error was not inconsequential. (Ford's Brief, p. 30.) Tiede worked for Ford for over thirty years and designed Ford's door latches. Tiede not only photographed the driver's door latch in an open operating position, he also reported no latch bolt deformation upon his personal inspection. In other words, Tiede made specific findings similar to Mr. Gilberg. Thus, this evidence was not merely cumulative as Ford argues, but material corroborative evidence and a party admission, which supported appellants' theory of how the door defectively opened. The primary means of protecting the occupant during a rollover is to keep the door closed. (R. 11474, p. 251[Addendum 92].) The importance of the defective latch was life or death for Tony Clayton. (AOB p. 22.)

III. BOTH ISSUES RAISED IN THE OPENING BRIEF REGARDING FORD'S SPECIAL JURY VERDICT FORM ARE REVIEWABLE.

Appellants submitted their proposed special verdict form on February 8, 2007, before the jury retired. (R. 10377-10383 [Addendums 71].)[15]/ Ford again erroneously argues "waiver." In fact, *Moore v. Smith*, 2007 UT App 101, P30-31 [158 P.3d 562]

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pursuant to Utah R. Civ. P. 26, would have undermined Caulfield's credibility about his subsequent findings. The credibility of a witness may be attacked by any party at trial. Utah R. Evid. 607.

[15] (See Ford's Brief, p. 33, fn. 21) Appellants also submitted a revised jury form on February 9, 2007, which the trial court apparently failed to file as part of the record. [See Addendum 73].

(Utah Ct. App. 2007) does not apply. Rather, Utah R. Civ. P. 49 (a) controls. "Waiver" is defined in Rule 49 (a). By submitting a special verdict form setting forth proposed special findings, appellants preserved the issue. There was no "waiver."[16]/

In *Cambelt Intl Corp. v. Dalton*, 745 P.2d 1239, 1241 (Utah 1987), the Supreme Court acknowledged that special interrogatories might have assisted the jury in sorting out difficult issues presented. The Supreme Court remarked that the general verdict submitted in Cambelt may well have permitted the jurors to avoid grappling with those complex issues. *Cambelt* is also distinguishable. Cambelt did not object to the trial court's failure to provide the jury with special verdict findings. In contrast, appellants submitted their own special findings to the trial court, which were rejected in favor of Ford's unreasonably simplistic verdict form. Ford's special jury verdict form also removed some of the defect theories of liability from the jury's consideration without a summary judgment motion or directed verdict. It caused the jury to avoid grappling with complex issues and was akin to a general verdict.

Appellants objected to the actual special verdict form given. (R. 11483, pp. 116-117 [Addendum 12].)[17]/ Ford's special verdict form asked the jury to consider and answer only one question: "Was the subject 1997 Ford Explorer defective and unreasonably

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[16] The waiver rule only applies "if counsel, either by statement or act" affirmatively represents no objection. See, *Moore v. Smith*, *supra*, 2007 UT App 101, P30. Appellants "acted" to preserve their objection to the omitted special findings by submitting their own special verdict form.

[17] Ford's special verdict form did not allow nor require the jury to consider or make findings on appellants' causes of action for negligence, failure to warn and breach of warranty. *Ibid.*

dangerous." Ford then capitalized on the omitted findings by arguing:

> ...and you have a jury verdict form and there's one question that starts with: 'Do you find that there is a defect in this Ford Explorer? Yes of no?' And if you answer no, then your work is done. (R. 11483, p. 83 [Addendum 12].)

The error was exacerbated when the trial court sequestered the jury, forcing the jury to rush through deliberation under duress. (See Argument VIII, *infra*.)

IV. THE TRIAL COURT CAUSED PREJUDICIAL ERROR BY GIVING JURY INSTRUCTIONS NOS. 27, 30 AND 31.

Instruction No. 27: The dicta submitted in Ford's instruction states: "there is no duty to make a safe product safer." Its implication was that the Explorer was safe and there was no duty to make it safer. The instruction had the potential of misleading the jury on the issue of "duty" as instructed in Jury Instruction No. 23 which states in part: A product is defective in design...if there is a risk of danger inherent in the design which outweighs the benefits of the design. In determining whether the benefits of the design outweigh the risks to which the product exposes the consumer... you may consider... "The availability of a substitute product that would serve the same function but would not be as dangerous. [¶] The ease or difficulty with which the unsafe character of the product could be eliminated without impairing its usefulness or making it too expensive to maintain its utility." (R. 10575 [Addendum 75].)

Instructions No. 30 and 31: These two jury instructions were extremely prejudicial. They induced the jury to speculate that something caused Tony's inattention which caused him to go off the road, rather than focus on whether the defectively designed automobile which was the cause of the rollover. Ford argues these instructions were

proper because Trooper Pace and Geoff Germane opined that Tony had likely fallen asleep at the wheel. (Ford's Brief, p. 37.) This testimony was speculative and cannot constitute "sufficient evidence" in light of the actual eyewitness, Hector Cantu, who followed the Explorer for miles and observed the rollover. See, *Day v. Lorenzo Smith & Son*, 17 Utah 2d 221, 224, 226 [408 P.2d 186] (Utah 1965).

Mr. Cantu did not see Tony speeding nor asleep, nor observe Tony swerve to avoid anything in the road. The rollover began before the Explorer left the pavement. (R. 11476, p. 156 [Addendum 5].) Cantu did not see any problems until he observed the Explorer with two tires up[18]/ before it left the pavement. (R. 11529, p. 10 [Addendum 4].)

Ford suggests "harmless" error claiming the jury never considered whether Tony was negligent. (Ford's Brief, p. 36.) This too is speculative because Ford argued:

> [T]he first thing I want to talk about...**The first theme was the fact that this was caused by driver error. That Mr. Clayton drifted off the curve, he overcorrected, and he caused it to go off the road and trip in the median. Circumstances that would cause many vehicles to rollover....The facts have shown that the Explorer didn't cause Tony Clayton to lose control. He lost control because he was asleep, inattentive, and he went off the highway exactly where the road curves**. (Emphasis added; R. 11483, pp 6-7 [Addendum 12].)

Based on Ford's closing argument, it is reasonable to expect the jurors considered Tony's negligence in deliberations.

V. THE TRIAL COURT'S DECISION TO BIFURCATE RELEVANT CAUSATION INJURY EVIDENCE WAS PREJUDICIAL.

Ford illogically argues that any error caused by bifurcating the trial was harmless

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[18] Two wheels up in the air means the rollover has begun. (R. 11476, p. 156 [Addendum 5].)

because the jury found no defect. (Ford's Brief, p. 38.) In support of its claim Ford argues "harmless error" citing *State v. Evans*, 2001 UT 22, P. 20 [20 P.3d 888] (Utah 2001). The harmless error standard again does not apply. The sole test is an abuse of discretion. An abuse of discretion standard requires the court to evaluate prejudice. Prejudice is shown if the issues are not clearly separable. *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1244 (Utah 1998).

Ford next unsoundly argues that appellants objected to evidence pertaining to the severity of the rollover (See, Point X, *infra*), therefore bifurcation was permissible. (See Ford's Brief, p. 39.) Appellants objected to the fallacious use of statistical evidence involving dissimilar vehicles which Ford used to argue the severity of the rollover. Appellants did not object to physical causation evidence which was necessary to establish elements required to be proven under the jury's instructions. Appellants were required to prove the gravity of danger posed by the design. It is precisely due to the inability to present relevant occupant injury causation evidence that appellants were unable to meet their burden of proof at trial. The exclusion of this evidence was prejudicial and contributed to the jury's lack of defect finding.

The excluded evidence established that Kellie, who remained seat-belted during the four complete rolls, suffered a sheer frontal lobe brain injury, facial lacerations, her teeth were knocked out, and her eyes were knocked out of line, requiring prisms for life (R. 11461, p. 129 [Addendum 3]) all because the occupant protection system was inadequate. Additionally, Ford took the remarkable contradictory position that Tony's hip could load the driver's door latch with an extreme amount of force to a breaking point,

but could not load the seat belt causing it to unlatch. The lack of any injury on Kellie's left side during the rollover was relevant circumstantial evidence to establish Tony did not collide violently against her at all, belying Ford's insistence that Tony was unbelted. (R. 8759.)

Ford concedes on p. 39 of its brief that the jury heard no expert testimony about the nature of the occupants' injuries. The evidence would have been pertinent to Instruction No. 23.[19]/ (See A.O.B. p. 33,) An automobile manufacturer is liable when it fails to eliminate unreasonable risks of foreseeable injury. *Fox v. Ford Motor Co.*, 575 F.2d 774, 780 (10th Cir. Wyo. 1978). The bifurcation order precluded appellants from offering evidence integral to the jury's consideration of occupant protection and the crashworthiness of the Explorer's design. This was highly prejudicial to Kellie because the jury was instructed that it could find Ford liable for Kellie's injuries even if Tony caused the accident. (R. 10593.) The gravity of the injury is highly relevant to assess the degree of care required to protect the occupants in a foreseeable event, a rollover. (R. 10593 [Addendum 75].) Therefore, a new trial is warranted. (AOB, p. 33.)

VI. APPELLANTS WERE DEPRIVED OF A FAIR TRIAL WHEN THE TRIAL COURT REVERSED ITSELF MID-TRIAL AND EXCLUDED RELEVANT FORD DOCUMENTS.

Ford again suggests a harmless error standard of review (Ford's Brief, p. 40) when

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[19] A product is defective if it fails to perform safely as an ordinary consumer or user would expect...or if there is a risk of danger inherent in the design which outweighs the design. The jury can consider...The gravity of danger posed by the design and the likelihood that such danger posed by the design would cause injury or damage. (R. 10575 [Addendum 75].)

an abuse of discretion standard applies. See *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993). Before the Clayton Explorer was sold, Ford engineers recommended a safer, alternative design. Therefore, the trial court acted unreasonably when it excluded evidence and testimony mid-trial that Ford knew that the Explorer was dangerously designed and had an opportunity to correct the defects.

Courts in at least two other jurisdictions have ruled similar evidence relevant and admissible. See, *Bado-Santana v. Ford Motor Co.*, 364 F. Supp. 2d 79, 92-94 (D.PR. 2005) [in an Explorer rollover case, the court denied Ford's motion to exclude evidence of design and development history of the Bronco II, finding the evidence relevant to Ford's knowledge of and failure to correct stability design flaws]; see *Buell-Wilson v. Ford Motor Co.*, 160 Cal. App. 4th 1107, 1132 (Cal. App. 2008) on remand.

Ford urges this Court to ignore the California appellate court case. (Ford's Brief, p. 43, fn. 27.) The fact that other jurisdictions have found the same evidence relevant and admissible should be considered persuasive. *Jackson v. Mateus*, 2003 UT 18, P18 [70 P.3d 78] (Utah 2003).

A. Don Tandy's Affidavit (Ford's Addendum F) is Inconsistent with his Trial Testimony in *Buell-Wilson v. Ford Motor Company* and the Excluded Ford Exhibits.

Ford urges the Court to believe Don Tandy's statements about the variances in the different model's design.[20]/ (Ford's Brief, p. 41.) Mr. Tandy signed off the UN 105,

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[20] Ford's own documents show the Explorer's high center of gravity was tied to the size of the tires. The Explorer was failing Ford's J-turn tests. A extremely relevant document excluded was Ford's new computer modeling policy which was relevant to the truthfulness of Tandy's testimony. [Addendum 45 (RGR 15846).]

Clayton model Explorer as being "resistant to rollover," using computer simulations that were not saved so the engineering data could not be peer reviewed. While Ford was working on testing the Explorer, Ford created a new computer modeling policy which involved Tandy. [Addendum 45 (RGR 15846).] At the time of appellants' trial, Don Tandy had been paid over twenty million dollars by Ford to testify as their "expert" and tell the public the Explorer was a safe vehicle with P-235 tires and it was passing all tests. (R. 11482, pp. 46-47 [Addendum 94].)

Furthermore, in *Buell-Wilson v. Ford Motor Co.*, *supra*, 160 Cal. App. 4th 1107, 1130, Ford's contention that the Bronco II and UN 46 design evidence was inadmissible was out right rejected. (See Ford's Brief, pp. 41-42.) The *Buell-Wilson* case involved a 1997 4-door Explorer. The trial and appellate court found that the Wilson family had "presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar." (*Ibid.*) The *Buell-Wilson* court logically reasoned the evidence was admissible as follows:

> Ford asserts that it was error to introduce evidence of the Bronco II because they were different vehicles, citing many differences in design...**[T]he evidence went to similarities in a particular design flaw, not the vehicles as a whole**. Where a plaintiff intends to adduce evidence of the functioning of related products to prove that the product in question was defective, identical conditions need not be present.... *Id.* at p. 1131; emphasis added.

In *Buell-Wilson v. Ford*, Don Tandy, testified that both Explorer models, the UN 46 ("First Generation" Explorer formerly designed and named Bronco II 4-Dr) and the 1997

UN 105 (same model as the Clayton Explorer), contained design flaws of similar engine heights and center of gravity, and track width. (R. 8839, 8841, 8842.)

Appellants' amended complaint alleges that Ford engaged in inadequate stability and rollover crash worthiness testing of the Explorer and similar vehicles. (R. 727, Amended Complaint, ¶ 31 a [Addendum 1].) Prior to trial, appellants submitted an offer of proof. The excluded evidence was relevant to appellants design defect and fraud case. The excluded evidence proves the UN 46 Explorer was an elongated version of the Bronco II. The proposed UN 46 Bronco II 4-door model's name was quickly changed by Ford in 1989 to the "Explorer," after adverse rollover publicity. [Addendums 36, 37, 38, 39.] Importantly, the UN 46 (First Generation Explorer) was not passing Ford's J-turn tests with P-235 tires; Ford's engineers knew this, and for the public's safety, recommended to management to not release the Explorer with tires that made it unstable. Ford created "strawman" tests for the Explorer to pass their "own" guidelines. Ford engineers stated: "Release 4 Dr. only with base P225 AS Tires." [Addendums 33, 34, 35.]

Ford engineers also recommended implementing design modifications to the UN 105 (Clayton) model immediately by widening the SUV's track by 2 inches and by lowering the front roll center 2 inches. [Addendum 32 (EXP4 1581).] The design modifications were not done. Ford made a decision to essentially carry over the same engine height rather than take advantage of the newly designed SLA suspension to lower the center of gravity. (R. 8826 [Addendum 25].) Ford engineers and management also had a proposed safer SUV design which was planned for release in 1995. (To replace the

UN 46) The PN38 had a lower center of gravity, a 63-65 inch track width, a much wider and safer track width than the UN 105 and UN 46 designs. [Addendum 42, at p. 15681.]

However, the jury never heard any of this evidence even though it would have showed Ford's notice of a particular design defect, the magnitude of the defect, and danger involved, and the Ford's ability to correct it. See, *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 650 (11th Cir. 1990).

B. Appellants were Prejudiced by the Exclusion of Relevant Evidence which would have established; Ford changed the name of Bronco II to Explorer; that the Explorer was not passing Ford's safety tests; and Ford had a Safer, Alternative Design.

When evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed. The excluded evidence was relevant to prove that Ford knew it was designing and manufacturing a vehicle with the same stability design defects as the Bronco II. See, *Buell-Wilson v. Ford Motor Co.*, *supra*, 160 Cal. App. 4th 1107, 1132.

At trial, appellants' engineering expert, David Ingebretsen, was only allowed to testify about Exhibit P-118 [Addendum 44] which showed the Explorer was failing Ford's accident avoidance maneuver test after the Clayton Explorer was manufactured, not before. (R. 11476, pp. 155-156 [Addendum 5]) Ingebretsen testified that the Explorer's P-235 tires raised the center of gravity (R. 11463, p. 89 [Addendum 9]); the Explorer was unstable and did not pass Ford's computerized J-turn test until the computer model was tweaked 20 pounds, the weight of a small child. (R. 11476, p. 159 [Addendum

5].) The excluded evidence affected appellants' substantial rights.[21]/ See, *Turner v. Nelson*, 872 P.2d 1021, 1023 (Utah 1994); *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 924 (Utah 1990).

Ford illogically and unreasonably argues appellants were unable to substantiate their claim. (Ford's Brief, p. 42, fn. 25.) Appellants could not substantiate their claim, not because they did not have legitimate relevant evidence to present through their own expert and through the cross-examination of Ford's expert Don Tandy, but because the trial court rejected appellants' offer of proof and erroneously excluded it. Ford's counsel capitalized on the court's mid trial ruling:

> We talked about their [Ford's] design process. About establishing the mission. Setting the targets. You got to select the dimensions. **You have to build and rebuild prototypes. And that's what Ford does. And then they test those prototypes.** And then they go back to design...And they don't release it until it meets their own guidelines and their own standards....And they have standards far above what any governmental agency requires of them. **Particularly in rollover resistance. And they confirm design intent by these testings**. And so here's, here's a summary of what we learned, I think from Mr. Tandy....**To be sure that it had high rollover resistance, Ford designed it to pass track testing, the J-turn testing, the ADAMS model. And Ford is the only manufacturer that makes itself do that**... Defendant's Exhibit 938, Ford's resistance to rollover guidelines. Not required. Nobody makes them do this. They impose it on themselves. **They won't let the vehicle out to the public unless it passes. They do the ADAMS J-turn simulation**... But then there was the allegation, Well, they just do the model and they don't, they don't correlate. That's false. We brought in Mr. Tandy, the guy that did the work. Here's the exhibits. They're in evidence, okay? **Didn't ask him [Mr. Tandy who was Ford's witness] about his work. Didn't ask him about anything having to do with these tests. Why? Because they know the work was done. They know the tests were done**...(Emphasis added. R. 11483, pp. 69, 70, 71-72 [Addendum 12].)

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[21] Appellants were also substantially prejudiced because the jury was told in opening statement that Ford self certified and Ford was aware that the Explorer was failing its own accident avoidance maneuver tests. (R. 11486, pp.16-17 [Addendum 91].)

> This isn't the (sic) Mr. Ingebretsen style: Trust me. These are my words. But I don't need to do tests. [¶] **We believe you do have to do tests if you want to prove something. Ford did that as they were designing the vehicle.** They've done it afterward. **It is not sensitive to this 235 versus 255 tire. It is not some 20 pounds in the simulation makes a difference. That isn't the truth.** (*Id.*, p. 72, emphasis added.)

The jury was required to find the defective condition "at the time the product was sold by the manufacturer...." (R. 10574 [Addendum 75].) Without the evidence, Ford was able to argue that appellants were unable to meet their burden of proof.

VII. THE COURT ERRED IN DIRECTING THE FRAUD VERDICT IN FAVOR OF FORD AS A MATTER OF LAW.

Ford again urges an incorrect standard of review. (Ford's Brief, p. 44.) A directed verdict can only be granted when no material fact exists. It does not involve harmless error review. See, *Nay v. General Motors Corp., GMC Truck Div.*, 850 P.2d 1260, 1261, 1264 (Utah 1993).

Ford also argues only one type of common law fraud (Ford's Brief, p. 44) while complete ignores appellants' fraudulent concealment argument addressed in the opening brief.[22]/ (See, AOB, p. 46.) Utah Courts have found that an omission is actionable as

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[22] By arguing only the "advertising" issue, Ford omits the Amended Complaint's factual allegations of common law fraud alleged as follows:

> FORD conducted tests of the Explorer...received reports and/or information from its employees, vendors, government agencies, lawyers and others...about actual accidents, **relating to the Explorer, its handling and its propensity to roll and cause injuries to its occupants**. From this information, FORD learned about the defects complained of herein. Yet, despite this knowledge, **FORD omitted to disclose to the plaintiffs and the rest of the buying public that the Explorer was defective and prone to lose control and roll over under normal driving conditions**... (R. 731, Amended Complaint, ¶ 52, emphasis added. [Addendum 1].)

common law fraud.[23]/ To establish a claim for fraudulent concealment appellants were only required to show (1) the nondisclosed information was material, (2) the nondisclosed information was known to the party failing to disclose, and (3) there was a legal duty to communicate. *Smith v. Frandsen*, 2004 UT 55, P12 [94 P.3d 919] (Utah 2004).

The Explorer brochure conveyed to the average consumer that Ford did everything in its power to engineer a "safe" vehicle including building strong doors, and that the Explorer could navigate difficult situations. (R. 11458, pp. 14, 17, 18, 19, 21-22, 23, 24, 25, 29, 30 [Addendum 47].) No rebuttal testimony was offered by Ford.

Appellants' expert, David Ingebretsen, testified that the Explorer's tire size lifted the center of gravity; the larger tire size added to the instability of the SUV. (R. 11463, pp. 89-90 [Addendum 9].) Tony's father, Fred Clayton, was not required to testify that he relied upon the tire size to purchase the Explorer. (See, Ford's Brief, p. 46.) Mr. Clayton testified he saw a sales brochure before he purchased the SUV. (R. 11459, p. 10, 11, 50-51 [Addendum 10].)

However, no one told the Clayton family that the tires on the Explorer were the wrong size or that the tires would make the SUV even more unstable and more dangerous

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This is similar to the Utah Attorney General's allegations. [See, Addendum 81.]

[23] Utah case law acknowledges that "negligent misrepresentation is a form of fraud." *Atkinson v. IHC Hosps., Inc.*, 798 P.2d 733, 737 (Utah 1990). See also *Christenson v. Commonwealth Land Title Co.*, 666 P.2d 302, 305 (Utah 1983) ("Negligent misrepresentation is a tort which grew out of common-law fraud."); *Robinson v. Tripco Inv., Inc.*, 2000 UT App 200, P 31, 21 P.3d 219 (Billings, J., dissenting) (identifying negligent misrepresentation as a "species" of fraud).

to drive. (*Id.* at p. 16.) Ford knew the Explorer was failing its own stability testing with P-235 sized tires. [Addendum 35, p. 0619]; Addendum 27.] The base tire was P-225. Indeed, the 1997 Explorer brochure recommends only P-225 size tires on the XLT model. (Trial Exhibit 3 [Addendum 28].) Yet, Ford sold the XLT to the Clayton family in a condition which made it unstable and failed to warn them of the known danger.

Ford illogically argues that the directed verdict was proper because Don Tandy who certified the Explorer as "resistant to rollover" using the "tweaked" computer modeling, testified the Explorer was stable and well-designed regardless of the tire option. (Ford's Brief, p. 46, fn. 29.) Ford's reasoning is once again flawed. The trial court granted Ford's motion for directed verdict before Don Tandy testified and could not have relied on the testimony to grant the directed verdict. (R. 10228, 10247 [Addendum 98].) Additionally,

This Court should further consider that evidence relevant to the Explorer's stability, center of gravity design and the tire size which changed the center of gravity and made the vehicle inherently more dangerous was erroneously excluded from the jury's consideration. [Addendum 33, pp. 1276, 1277; Addendum 35, p. 0619; Addendum 49.] Consequently, the directed verdict was improvidently granted. The fraudulent concealment issue should go to the jury upon a retrial.[24]/

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[24] Even Utah's attorney general claimed the Explorer was car like when it had a high risk of rollover. The Explorer's instability is not simply about "Firestone" tires. (Ford's Brief, p. 45, fn. 28.) The SUV exceeds stability capacity by simply having a person in each seat. Indeed, the gravamen of the Attorney General's complaint was false advertising of the Ford Explorer. [Addendum 81.]

VIII. APPELLANTS HAVE DEMONSTRATED PLAIN ERROR IMPLICIT IN THE TRIAL RECORD CITED IN APPELLANTS' BRIEF. THIS CASE IS DISTINGUISHABLE FROM *STATE V. BOYD*, 2001 UT 30.

A. Appellants' Brief Demonstrates Plain Error. Ford's flawed reliance on *State v. King*, *supra*, 2006 UT 3, P13, to argue waiver should be rejected. Review is appropriate where plain error is demonstrated from the circumstances. *State v. Cram*, 2002 UT 37, P9 [46 P.3d 230] (Utah 2002); *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996). The trial court itself acknowledged error when it stated on the record that it was not appropriate for the jury to begin deliberations on this complex engineering case on a Friday afternoon. (R. 11487, p. 3 [Addendum 16]; See also, AOB, p. 47.) The record establishes plain error. See, *State v. Boyd*, 2001 UT 30, P48 [25 P.3d 985] (Utah 2001).

Moreover, appellants demonstrated "prejudicial error" from the facts argued in the opening brief. (See AOB p. 50.) Nothing precludes a reviewing court from taking notice of plain errors affecting the substantial rights of a party. Utah R. Evid. 103 (d). No magic words are required. See, *State v. Rangel*, 866 P.2d 607, 611 (Utah Ct. App. 1993).

Ford nonetheless argues that the jury did not complain about working through their lunch break and deliberating for another two and a half hours without being fed. (Ford's Brief, p. 47, fn. 30.) However, appellants do not know whether the jury complained or not because the jury notes were sealed without any explanation in the trial court's minutes. (R. 10550, 10551-10552.) Pursuant to Utah R. App. P. 11 (h), the Court can act on its own initiative and review the sealed record.

B. *Boyd* is also distinguishable. Contrary to Ford's argument, the circumstances here are quite different from *Boyd,* 2001 UT 30, P48. In *Boyd*, the jury did not begin deliberations without eating lunch. In *Boyd*, there was no limited examination of evidence. (R. 11483, pp. 124-125 [Addendum 12].) Indeed, the *Boyd* trial involved a simple deliberation – whether the defendant committed rape.[25]/ In contrast, after hearing weeks of complex engineering testimony, the jury also had to potentially review and weigh over 280 exhibits presented by both sides. [Addendum 18.] There were also 51 jury instructions given. The jury instructions and alternative theories of product liability alone warranted extended deliberations. Thus, reversal is required.

IX. APPELLANTS DID NOT LEAD THE COURT INTO ERROR; IT OCCURRED WHEN THE COURT REFUSED TO PERFORM ITS OFFICIAL DUTY TO INSURE JUROR NO. 3 WAS NOT BIASED.

Ford restates the issue to argue "invited error" by ignoring the fact that appellants' counsel asked the trial court to voir dire Juror No. 3 as follows: I think we probably **should voir dire** him further to be certain that, that he hasn't – if he has committed himself already **I think it might be cause for recusing him**. (Emphasis added; R. 11466, pp. 4-5 [Addendum 15].)

The Court rejected counsel's request stating: ...I don't think we have enough here to move forward to any **second stage**....(*Ibid.*; emphasis added.)

There was no "invited error." The purpose of the invited error doctrine is to give the trial court the first opportunity to address the error. *State v. Geukgeuzian*, 2004 UT

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[25] Contrary to Ford's argument, the issue is one of first impression in a complex civil case. (Ford's Brief, p. 47.) Unlike *Boyd*, the jury verdict was not unanimous.

16, P12 [6 P.3d 742] (Utah 2004). Ford unreasonably argues that appellants never moved for a mistrial or moved to disqualify Juror No. 3. (Ford's Brief, p. 49.) The problem is that appellants did not have sufficient cause to remove the juror because the court refused appellants' request to voir dire the juror; hence, no ground for a mistrial. Moreover, the decision to grant or deny a mistrial rests within the sound discretion of the trial court. *State v. Dominguez*, 2003 UT App 158, P14 [72 P.3d 127] (Utah Ct. App. 2003). Ford's argument also silently ignores that the day before the bailiff informed the court of Juror No. 3's potential bias, Ford had made a mistrial motion complaining about the unhappy juror, which was denied. (R. 11472, p. 51; see also, R. 9893 [Addendum 87].) Without being able to show actual bias, any further objection would have been futile. The law does not require futile acts. See *Scheufler v. General Host Corp.*, 126 F.3d 1261, 1268 (10th Cir. Kan. 1997).

Notwithstanding, questions of waiver often hinge on the critical element of intent. Before finding waiver, a court should look at the totality of the circumstances in discerning intent. *United Park City Mines Co. v. Stichting Mayflower Mt. Fonds*, 2006 UT 35, P22 [2006 UT 35] (Utah 2006). Ford argues appellants invited error by merely agreeing that a cautionary instruction was then appropriate.[26]/ There was no intent to waive the issue and no invited error. Rather, the error occurred when the court refused to perform its official duty to move to the "second stage" and examine or allow counsel to question Juror No. 3 and allowed the juror to remain on the jury without further questions

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[26] The court's separation admonition advised the jury to not talk among themselves about the case and not to form any opinions.

designed to probe the extent and the depth of the juror's bias.[27]/ Utah R. Civ. P. 47(f)(6); *State v. Saunders*, 1999 UT 59, P36 [992 P.2d 951] (Utah 1999); *West v. Holley*, 2004 UT 97, P15 [103 P.3d 708] (Utah 2004); *State v. Calliham*, 2002 UT 86, P49 [55 P.3d 573] (Utah 2002); *State v. King*, *supra*, UT 3, P19.

X. APPELLANTS MOVED TO EXCLUDE THE STATISTICAL EVIDENCE CHART AND TESTIMONY BEFORE TRIAL AND ALSO FILED THEIR WRITTEN OBJECTION TO DEFENDANT'S EXHIBIT 457; THE ISSUE IS REVIEWABLE.

Ford claims that Exhibit 457 was introduced without any objection. (Ford's Brief, p. 51.) Not true. Appellants moved to exclude the statistical evidence AND opinion testimony in a pretrial motion (R. 7647-7657, [Addendum 19]) which the trial court denied. (R. 9591 [Addendum 21].) Appellants also filed a written objection to Ford's Exhibit 457 based on Evid. R. 401, 402, 403 and 702. (R. R. 9698 [Addendum 85].) Thereafter, the court heard argument and issued a pretrial ruling. (R. 9591.)

Utah R. Evid. 103 (a)(2) states: "Once the court makes a definitive ruling on the record admitting...evidence, either at or **before trial**, **a party need not renew an objection or offer of proof to preserve a claim of error for appeal**." Emphasis added; see also, *State v. Dominguez*, *supra*, 2003 UT App 158, P18, citing *State v. Saunders*, *supra*, 1999 UT 59, PP18-19 (holding because defendant objected to the court's pretrial ruling, he was not required to make a further objection at trial to preserve the issue for

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[27] Appellants have demonstrated the trial court abused its discretion. Juror No. 3 was an engineer. The bailiff overheard Juror No. 3 say: "You guys know what I think already." (R. 11466, pp. 3-4 [Addendum 15].)

appeal). Failure to raise a futile objection should not constitute waiver.[28]/ Furthermore, even if the issue was not preserved, it can be reviewed to avoid duplication of the error on remand. See, *Dalebout v. Union Pac. R.R. Co.*, 1999 UT App 151, P23 [980 P.2d 1194] (Utah Ct. App. 1999).

It was in this context that Ford thereafter introduced the statistical chart during cross-examination of appellants' engineering expert witness, David Ingebretsen. Ford asked Ingebretsen about the data. To this Ingebretsen replied: "There were a lot of qualifiers in there. What this chart shows is that just 1 or 2 percent of the total rollovers recorded in this database were 16 quarter turns. [Addendum 95, pp. 28, 31.][29]/ Ingebretsen did not adopt the "statistical" chart testimony relied upon by Ford's expert and did not attest to its accuracy.[30]/ Ford's argument is fallacious. The other less severe accident data could have resulted because the other vehicles were designed safer or stronger than the Ford Explorer. The other design evidence was prejudicial and inadmissible.

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[28] This is not a case where appellants stood silently by allowing prejudicial error to occur. Appellants took affirmative steps by moving to exclude the prejudicial statistical evidence pretrial with an offer of proof, and then filed written objections to this evidence. Rule 103 (a)(2) only requires that the court be given opportunity address the error. See also, *State v. Harter*, 2007 UT App 5, P26 [155 P.3d 116] (Utah Ct. App. 2007). Because the admissibility of the statistical evidence was purely a question of law, a contemporaneous verbal objection would have been futile.

[29] Ford only cites to the Exhibit List without submitting Ingebretsen's trial testimony. Pursuant to Utah R. App. P. 11 (h), this Court can augment the record to determine the truth of what occurred. (Appellants previously moved to augment the record with a transcript lodged by DepoMax with the Court, but appellants' motion was denied on July 11, 2008.)

[30] Ford argues Ingebretsen testified that the statistics were available in SAE papers. (Ford's Brief, p. 51, fn. 31.) Ingebretsen did NOT adopt the chart's reliability.

Ford's "statistical" chart and Germane's inadmissible opinion on causation was derived from other accident evidence which included light trucks, SUVs, vans, pickup trucks and passenger cars. (R. 11452, p. 112 [Addendum 20].) This same type of testimony that was categorically rejected in *Buell-Wilson v. Ford Motor Co.*, *supra*, 160 Cal. App. 4th 1107, 1135.[31]/ The other accident statistical evidence should have been excluded because it did not meet the substantially similar circumstances requirement according to Utah case law which would permit admissibility. See, *Ostler v. Albina Transfer Co.*, 781 P.2d 445, 449 (Utah Ct. App. 1989).

Finally, Ford's brief, p. 52, ignores that the jury was asked to rely upon the statistical evidence. Ford argued:

> ... And therefore it is worse, as measured by quarter turns, than 99.9 percent of the accidents. And again, I think I've heard some criticism, Oh, statistics don't tell you what happened. **You can look at that chart and see exactly what happened.** They were in one of the worst accidents in rollovers that are studied in the country. Ninety-nine point nine percent are less severe. (Emphasis added; R. 11483, pp. 47-48 [Addendum 12].)

There is a reasonable probability the error affected the outcome of the trial. *Larsen v. Johnson*, *supra*, 958 P.2d 953, 958. The jury was invited to analyze the chart and statistical evidence to see "exactly what happened."

Thus, based on this evidence, the jury could have reasonably concluded that appellants had not met their burden of proof.

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[31] In the *Buell-Wilson,* Ford's proposed testimony compared the Explorer's rollover performance to a variety of dissimilar vehicles, including Greyhound buses and passenger cars. (*Ibid.*)

XI. FORD REFRAMES THE ISSUE. APPELLANTS' BRIEF CONTENDS THE TRIAL COURT ERRED BY ALLOWING TROOPER PACE TO TESTIFY AS AN "EXPERT" BASED ON HIS SUPERFICIAL INVESTIGATION.

First, prior to trial, the court ruled that Trooper Pace had personal knowledge of the scene and advanced training in accident reconstruction and could offer testimony. (R. 6555 [Addendum 22].) Thereafter, appellants again moved to exclude Pace's "expert" seatbelt testimony as cumulative (R. 7798, 7801-7803 [Addendum 24]) and his other opinions and conclusions as speculative. (R. 7934-7947 [Addendum 23].) Appellants' pretrial motions were again denied. (R. 9593-9594 [Addendum 21].) No further objection was required. Evid. R. 103 (a)(2).[32]/

Against this backdrop, appellants were in the position of making a Hobson's choice of having to explain Trooper Pace's anticipated testimony before it was presented to the jury at trial by Ford. At no time, did appellants acquiesce to allow Pace to testify as an "expert." As a matter of fact, after Pace testified, appellants again moved to strike Pace's speculative causation opinion testimony that bordered on an "expert" opinion, but again their motion was denied.[33]/ (R. 11479, p. 94 [Addendum 6].)

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[32] Ford reframes the issue. Appellants invited no error. Evid. R. 103 (a)(2).

[33] Appellants' objections to Paces' expert testimony preserved review. The introduction of the accident report, Exhibit P-22 [Addendum 88] did not waive the issue. (See, Ford's Brief, p. 53.) Appellants sought to introduce only the official portion of the report that contained the measurements to the skid marks. Ford later introduced its version of the accident report with **coded boxes** that Trooper Pace had checked which required a key for the jury to interpret. (R. 11479, pp. 48 -52 [Addendum 86].) It was Pace's speculative "expert" opinions which appellants objected to before trial and after his testimony, not the diagrams or marks in the police report, done by other officers.

The error was not harmless.[34]/ Ford used Pace's testimony to convincingly argue:

> It was his [Pace's] job to figure out what happened in this accident. (R. 11483, p. 12 [Addendum 12].)
>
> This is an individual whose job it is to figure out what occurred. (R. 11483, p. 13 [Addendum 12].)
>
> **This isn't a paid expert**. This is the guy whose job it was to understand what happened. (R. 11483, p. 14 [Addendum 12].)
>
> Let's go through the evidence you've heard. First of all with Officer Pace. He did an investigation...It isn't just happenstance. It's inattention...He's studied it. He's investigated it. '**Trooper Pace, after completing your investigation and completing your report, can you tell us your general conclusion?' He says: 'My general conclusion is the driver was asleep or inattentive. He was either picking something up, ran off the road to the left, overcorrected back to the right, overcorrected back to the left**.' Okay? **This isn't a paid expert.** This is the man on the scene that day. **Trying to understand what happened...Inattentive. Off the road. Asleep.**... (Emphasis added; R. 11483, pp. 17-18 [Addendum 12].)
>
> Officer Pace again: '**You have training about inattentiveness or asleep?' This isn't guess. He says: 'Yes. We're given training. We're taught to understand when you can perceive that happened and when not.' It's part of his training.** And then he was asked: 'Comparing this accident to other accidents, is this consistent with sleeping and inattentiveness?' And he says: 'Yes, very consistent.' And then we talked about – a little bit about his accident report, where he determines that it was a prime contributor that he was asleep or inattentive... So now we've covered Officer Pace. **Not a paid expert**.... (Emphasis added; R. 11483, pp. 18-19 [Addendum 12].)

Reversible error has been demonstrated. Utah R. Civ. P.59 (a)(7). Ford's argument that police officers' testimony is routinely admitted in Utah courts is flawed. (Ford's Brief, p. 55.) In *Day v. Lorenzo Smith & Son, supra*, 17 Utah 2d 221, 224, 226, the Utah Supreme Court held that the record did not disclose a proper foundation to

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[34] See, *Larsen v. Johnson, supra*, 958 P.2d 953, 958.

support the officer's opinion testimony as to the point of impact. The officer did not see the actual impact; therefore his opinion had to be based upon facts derived from his investigation. The Supreme Court reasoned:

> "Was this error prejudicial? Yes. The point of impact was an important fact, if not a controlling one, to be determined by the jury in reaching its verdict. The lay eye witnesses differed in their testimony as to which side of the road the vehicles were on when they collided. It is only fair to assume that a jury would be impressed by and give considerable weight to the testimony of a patrolman with 24 years of experience in accident investigations. There is a reasonable likelihood that in the absence of such testimony the jury might have reached a different result."

Likewise, the jury in appellants' case was was asked to, and likely gave great weight and respect to Trooper Pace's unpaid "expert" causation opinion. Therefore, prejudicial error has been demonstrated. Reversal is required.

XII. THERE WAS SUBSTANTIAL CUMULATIVE ERROR WHICH DEPRIVED APPELLANTS OF A FAIR TRIAL.

The combination of errors constitutes cumulative error and warrants a new trial. *Whitehead v. American Motors Sales Corp.*, *supra*, 801 P.2d 920, 928.

* * *

FORD'S CROSS-APPEAL

XIII. FORD'S CROSS-APPEAL SHOULD BE DENIED.

At trial, it was Ford's burden to prove facts essential to the defense of statute of limitations. *Stevens v. Roberts*, 16 Utah 105, 109 [51 P. 261] (Utah 1897).

A. This Court should Reject Ford's Appeal of the Jury's Finding Because Ford has Failed to Marshal the Evidence. The Jury's Special Finding Should Stand.

Ford's special jury verdict question invited the jury to objectively identify a date when Kellie should have known that Ford was responsible for her injuries. Ford has the obligation to marshal the evidence and to demonstrate that the jury's finding lacks substantial evidentiary support. *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989). At trial, Ford did not present any evidence when Kellie's law suit was filed in her behalf by her attorneys. (See Ford's Brief, p. 56.) Having presented no evidence, Ford cannot complain that the jury's special finding was erroneous.[35]/

Furthermore, the jury's finding was not per se unreasonable or against the weight of the evidence. Tony's father, Fred Clayton, testified that it was late in September 2000, that he found internet research about the Explorer. He only thereafter made the decision to sue Ford. Mr. Clayton wanted to be sure that Ford was at fault before suing the company. He did not discuss his subsequent decision to sue Ford with Kellie. After he wrote a letter in March 1999 to Geico Insurance to help seek compensation for Kellie's medical expenses,

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[35] To mount a successful attack, Ford must marshal all the evidence and then demonstrate that even viewing it in the light most favorable to the findings, the evidence is insufficient. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). Ford has failed to present evidence at trial which would support its version of the facts.

Mr. Clayton wanted Kellie to get on with her life since it was painful for him to talk about his son's death with her. (R. 11459, pp. 30, 31, 33, 94, 96-97 [Addendum 89].)

Kellie was not allowed to testify regarding the extent of her brain injury or her emotional problems caused by the rollover. With the help of Tony's father, Kellie sent a letter to the insurance company to recover her medical expenses. A month later, on April 13, 1999, Kellie hired attorney Keith Barton to pursue her claim against Geico Insurance Company. On June 29, 1999, Kellie signed a release of her claims against Geico, ending Barton's brief representation.[36]/ When Kellie signed the settlement agreement, she had no knowledge of the Explorer's design defects. Ford took Kellie's deposition on October 28, 2003.[37]/ Kellie testified that she was represented by Brian Steffensen; she met with him before her deposition on that date. Tony's father did not tell her to sue Ford. (R. 11478, pp. 16-17, 18, 26, 28, 43, 44, 47, 48, 60, 69, 70, 73 [Addendum 90].)

It is clear from the evidence presented at trial, and Jury Instruction No. 46 (R. 10599) which was given, the jury objectively believed Kellie reasonably knew or should have known of her claims against Ford by the date of her deposition. Because the special finding was not against the weight of the evidence presented at trial to the jury – the special finding must stand upon retrial.

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[36] Ford did not call Barton as a witness to establish he had any prior knowledge that the Explorer was defectively designed.

[37] Ford was not contending that Kellie released any claims against Ford when she signed the settlement agreement.

B. The Trial Court did not Err in Denying Ford's Summary Judgment Motion against Kellie Montoya Based on the Statute of Limitations Ground, because there were Contested Issues of Fact as to When Kellie Should have Reasonably Discovered the Explorer's Design Defects; Due Diligence cannot be Resolved at the Summary Judgment Stage.

Ford did not appeal the trial court's denial of its partial summary judgment motion. (R. 11397-11398 [Addendum 97].) Thus, this Court should decline to review the issue. Notwithstanding, the trial court did not err since the issue involved a question of due diligence. The general rule which applies to the "discovery rule," is that the statute of limitation is tolled until the plaintiff discovers (or should have discovered) all of the facts that form the basis for the cause of action. *Aragon v. Clover Club Foods Co.*, 857 P.2d 250, 252 (Utah Ct. App. 1993).

As the *Aragon* court acknowledged, a plaintiff does not have enough information to sue until he knows that he has been injured, he knows the identity of the maker of the product, and he knows that the product had a causal relation to his injury. *Id.* at p. 253, emphasis added, citing *Hickman v. Grover*, 178 W.Va. 249, 358 S.E.2d 810, 813 (W.Va. 1987). It is this third prong which created a triable issue at trial.

In most states, a plaintiff's lack of knowledge of a product's defect causing personal injury affects the statute of limitations if a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of such cause. In these cases, the cause of action begins to accrue when the injured person knew, or by the exercise of reasonable diligence, should have discovered, the defect or the cause of the injury. Similarly, if there is fraudulent concealment of the defect in the product, then the

statute of limitations does not begin to run until the fraudulent concealment should have been discovered. *Sawtell v. E.I. Du Pont De Nemours & Co.*, 22 F.3d 248, 251 (10th Cir. N.M. 1994) citations omitted.

In its summary judgment motion, Ford presented no evidence that Kellie spoke with Tony's father about the Ford Explorer lawsuit. On the other hand, appellants contested several disputed facts related to due diligence. (R. 2815-2819; 2843-2842.) Indeed, the extent of the Explorer's defective design and instability was not known until NHTSA (National Highway Traffic Safety Administration) and the states attorney generals began their investigations into the safety of the Ford Explorer. Due diligence in determining the causal relationship of the defective product to the causal injury is an unresolved question of fact, which precluded partial summary judgment in favor of Ford. See, *Aragon v. Clover Club Foods Co., supra*, 857 P.2d 250, 254 citing *North Coast Air Services, Ltd. v. Grumman Corp.*, 759 P.2d 405, 411 (Wash. 1988) (due diligence was an unresolved question of fact precluding summary judgment).

Finally, Ford argues the trial court should have granted summary judgment in its favor because Montoya hired Keith Barton on April 13, 1999. (Ford's Brief, p. 57.) Ford again falsely portrays the record stating: "Mr. Barton even inspected the vehicle." (Ford's Brief, p. 60.) The actual transcript states exactly the opposite. Attorney Barton testified at his deposition: "there was not an inspection of the vehicle by our office." (R. 2691, pp. 2703-2704 [Addendum 93].)

Ford had the record and cited to it in making its inaccurate claim to this Court in its

brief. There is no evidence whatsoever that Barton inspected the Explorer and should have known of the defects. In fact, Ford presented no evidence other than its own conjecture that attorney Barton was hired to conduct an investigation. Summary judgment was appropriately denied.

XIV. FORD'S FRIVOLOUS REQUEST FOR ATTORNEY'S FEES AS COSTS FOR RESPONDING TO ISSUES 1, 8, 9, 10 AND 11 SHOULD BE DENIED.

Ford's contention it should be awarded attorney fees under Utah R. App. P. 33 should be rejected. (Ford's Brief, pp. 61.) Sanctions for frivolous appeals[38]/ should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions. *Porco v. Porco*, 752 P.2d 365, 369 (Utah Ct. App. 1988).

Ford argues at p. 61, fn. 38, that appellants should be sanctioned for carefully wording that Issue VIII "is an issue of first impression in a civil case in Utah." Ford's contention is frivolous. This is a true statement. (See Issue VIII.)

Ford argues at p. 61, fn. 39, that appellants stipulated to a limiting instruction. Ford has reframed the issue. Appellants asked the trial court to voir dire of the juror to determine bias. Appellants' request was rejected prior to the court giving a "cautionary" instruction. There was no invited error. (See Issue IX.)

Ford argues at p. 61, fn. 40, that appellants did not object to the statistical chart, but fails to acknowledge appellants filed a pretrial motion with an offer of proof, and thereafter also filed evidentiary objections to Exhibit 457. (R. 7934-7947 [Addendum 23]

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[38] A frivolous appeal is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law.

see also 7798, 7801-7803 [Addendum 24]; R. 9698, 9730 [Addendum 85].) Under Utah R. Evid. 103 (a)(2) the issue was preserved for appeal. (See Issue X.).

Ford argues at p. 61, fn. 41, that Fred Clayton testified to what Trooper Pace told him which invited error. Ford again reframes the issue. At no time did appellants agree that Pace was an "expert" who could offer "expert" testimony based on his superficial investigation. Appellants also moved to strike Pace's "expert" opinion testimony at trial. (R. 11479, R.T. 1/30/07, p. 94 [Addendum 6].) The issue is reviewable. (See Issue XI.)

Ford's Brief offers no basis at all for sanctioning appellants for raising Issue I, the denial of appellants' motion for new trial on R. Civ. P. 59 (a)(1) grounds.

Appellants have demonstrated trial error. Appellants' claims are grounded in facts and supported by legal reasoning to justify review of the issues. Appellants have also submitted addendums 1-100, citing to the relevant portions of the record on review. Accordingly, Ford's motion is frivolous and based on non-sanctionable grounds. Ford's request for attorney's fees should be denied.

XV. APPELLANTS' REQUEST FOR ATTORNEY'S FEES AND COSTS SHOULD BE GRANTED.

On the other hand, appellants should be awarded attorney's fees and costs under Utah R. App. P. 33 for having to respond to Ford's frivolous, false and misleading statements of the record, and misstatements of the law to argue waiver, harmless error or invited error.

Additionally, Ford's cross-appeal on the jury's special finding regarding the statute of limitations date is clearly frivolous because Ford failed to marshal the evidence to

support its appeal of the jury's special finding and failed to introduce a date Kellie's law suit was filed at trial. Ford's cross-appeal based on the trial court's denial of its partial summary judgment motion is also frivolous because Ford failed to appeal that issue. (R. 11397-11398 [Addendum 97].) Thus, pursuant to R. App. P. 33(c)(1), this Court should consider awarding appellants its attorney's fees and costs required to respond to Ford's frivolously raised contentions and legally unsound argument.

Ford's factual misrepresentations of fact and law should be found frivolous under Utah R. App. P. 33, applying a Utah R. Civ. P. 11 analysis. See for example, *Morse v. Packer*, *supra*, 2000 UT 86, P29, 31. Or alternatively, this Court, on its own initiative, may enter an order directing Ford's counsel to show cause why it has not violated Utah R. Civ. P. 11 (b). See, Utah R. Civ. P. 11 (c)(1)(b). Ford's misstatement of Barton's deposition testimony which was submitted in the summary judgment proceeding warrants such *sua sponte* order.

The numerous instances are set out in the reply brief. Appellants estimate that approximately 70 percent of the time expended to research and draft the reply brief to Ford's misstatements of facts and law.

* * *

CONCLUSION

Appellants respectfully ask this Court to reverse the judgment and remand the case for a new trial with instructions including ordering an evidentiary hearing on the Utah R. Civ. P. 59 (a)(1) grounds if necessary. Appellants pray that the remand include other instructions on the admissibility and inadmissibility of evidence and an order that the retrial shall not be bifurcated.

Cross-appellee, Kellie Montoya-Baker asks this Court to affirm the jury's verdict and judgment on the statute of limitations finding.

Appellants further ask this court to consider awarding appellants its attorney's fees and costs required to respond to Ford's frivolously raised contentions and arguments as stated herein.

DATED AND SUBMITTED this 21 day of July, 2008.

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IN THE UTAH COURT OF APPEALS

DOLORES CLAYTON, et al., Plaintiffs/Appellants, vs. **FORD MOTOR COMPANY**, et al., Defendant/Appellee.	**CERTIFICATE OF SERVICE** Appellate Case No. 20070517-CA Civil No. 000909522

Appeal from the Judgment of the Honorable Joseph C. Fratto
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

CERTIFICATE OF SERVICE

I hereby certify the foregoing APPELLANTS'COMBINED REPLY BRIEF AND CROSS-APPELLEES' BRIEF (two copies) and APPELLANTS' SUPPLEMENTAL

ADDENDUM IN SUPPORT OF COMBINED OVERSIZE REPLY BRIEF AND CROSS-APPELLEES' BRIEF(two copies) were served upon defendant's counsel at the address listed below, by depositing the same in the United States mail, postage pre-paid on the 21st day of July, 2008.

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